



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2003

Mr. Charles H. Homer, III
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2003-8106

Dear Mr. Homer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190922.

The Texas Department of Health (the "department") received a request for inspection, investigation, and complaint information regarding the requestor's businesses, Tiller MIND BODY, Inc. and MIND BODY Naturopathic Institute, to include information regarding inspections occurring August 22, 2003, July 1, 2003, January and February, 2003, February, 1998, and March, 1997. In addition, the department received two requests, from the above requestor and an additional requestor, for information regarding an investigation of an incident involving a client of a facility using equipment purchased from Tiller MIND BODY, Inc. You state that some responsive information will be released. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As a preliminary matter, we note you also claim that release of portions of the information at issue may implicate the proprietary interests of third parties under section 552.110 of the Government Code, although you take no position as to whether the information is so excepted. Thus, you state, and provide documentation showing, that you notified the International Association for Colon Hydrotherapy, the Class 3 Study Group, Inc., Colon Therapeutics, Inc., Quality Metric, Inc., and Specialty Health Products, Inc. of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the third parties you notified have submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Thus, we have no basis to conclude that any third party has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, we must address the department's obligations under section 552.301 of the Government Code with respect to the information enclosed for our review in your submission of October 7, 2003. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Your submission of October 7, 2003 includes inspection information that is responsive to the request for information concerning the August 22, 2003 inspection of the first requestor's businesses. We find that the department has failed to submit this information within the fifteen business day deadline as mandated by section 552.301(e) of the Government Code. Accordingly, we find that the department failed to comply with the procedural requirements of section 552.301 with respect to this portion of the information enclosed in your October 7, 2003 submission.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the provisions of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630* (1994). Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, section 552.103 does not demonstrate a compelling reason to withhold this information from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). You also claim sections 552.101 and 552.137 with respect to this information. Sections 552.101 and 552.137 can provide compelling reasons to overcome the presumption of openness.² Thus, the discussion below concerning the applicability of sections 552.101 and 552.137 shall encompass the information in the late-submitted documents as well as the information that was timely submitted for review.

Much of the information at issue is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The submitted documents include completed reports. Therefore, as prescribed by section 552.022, the department must release this information unless it is excepted under section 552.108 or is confidential under other law.³ You contend that the completed reports at issue are excepted under section 552.103. However, because section 552.103 is a discretionary exception to disclosure, it is not other law that makes information expressly confidential for purposes of section 552.022(a). Thus, the department may not withhold the

²We note you do not claim that the late-submitted information is excepted under sections 552.107, 552.130, or 552.136 of the Government Code.

³You do not raise section 552.108 as an exception to disclosure in this instance.

reports under section 552.103 of the Government Code. However, we will address your other claimed exceptions with respect to the completed reports.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that a portion of the information subject to 552.022 consists of medical records subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

We have marked medical records in part of the section 552.022 information that pertain to a patient who is now deceased. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, 005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records in the section 552.022 information that may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have also marked medical records in the remainder of the submitted information that also may be released only as provided under the MPA.

You also contend that portions of the reports at issue, pertaining to clients of the facilities inspected by the department, are protected by privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or

physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review of the submitted information, we agree that the information you have marked in the section 552.022 information that identifies clients of the facilities at issue is protected by privacy. We have also marked some additional client identifying information that the department must withhold under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy. We note that the submitted audio tape recording contains the name of a client of an inspected facility. The department must withhold the portions of the submitted audio tape recording containing the client's name pursuant to section 552.101. We further note, however, that the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Accordingly, information pertaining to a deceased individual in the section 552.022 information may not be withheld pursuant to section 552.101 in conjunction with a right of privacy.

The section 552.022 information at issue also contains social security numbers. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments

make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* Because this federal provision is intended to protect the privacy interests of individuals, this provision does not encompass the social security number of a deceased individual. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). However, the submitted information contains other social security numbers that may be confidential under section 552.101 in conjunction with the federal law. We have no basis for concluding that any of the social security numbers in the submitted information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the department should ensure that no such information was obtained or is maintained by it pursuant to any provision of law, enacted on or after October 1, 1990.

The section 552.022 information at issue also contains e-mail addresses of members of the public. Section 552.137 of the Government Code provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137).

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. The e-mail addresses in the submitted information are within the scope of section 552.137(a). Unless the department has received affirmative consent to disclose the e-mail addresses, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code.

Next, you contend that part of the section 552.022 information contains information that is excepted under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

We agree that the department must withhold bank account number information that you have highlighted in the submitted documents pursuant to section 552.136 of the Government Code.

Next, we note that the section 552.022 information contains Texas driver's license numbers that are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The department must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

We conclude our discussion of the information subject to section 552.022 in the submitted documents by noting that a portion of the information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

We now turn to the submitted information that is not subject to section 552.022 of the Government Code. We note you contend that a portion of this information is excepted under section 552.107 of the Government Code as information protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the

individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this case, you have marked information that you indicate constitutes communications between department staff and attorneys, and between the department and the Office of the Attorney General. You further indicate that these communications were made in furtherance of the rendition of professional legal services to the department, and that the confidentiality of the communications has been maintained. Based on your representations and our review, we agree that portions of the remaining information, which we have marked, are protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

With respect to the remainder of the submitted information, we address your claim under section 552.103. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In this case, you inform us, and provide documentation showing, that before the department received the present requests for information, the department had referred several cases involving the companies at issue in the submitted documents to the Consumer Protection Division of the Office of the Attorney General. The department has requested that the Office of the Attorney General seek injunctive relief and civil penalties, as appropriate, for alleged violations of chapter 431 of the Health and Safety Code by the companies at issue. Based on your representations and our review of the submitted documents, we determine that the department reasonably anticipated litigation in these matters on the dates the department received the present requests for information. We further agree that the submitted documents relate to the subject matter of the anticipated litigation. Thus, we find that some of the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code.

This office has determined, however, that once information has been obtained by all parties to litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Here, it is clear from our review of the documents at issue that the targets of the anticipated lawsuits have seen or had access to much of the submitted information. We have marked documents provided to or obtained by opposing parties in the anticipated litigation that may not be withheld under section 552.103 and must be released. We conclude that the department may withhold the remaining documents under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the majority of the submitted information consists of completed reports that are subject to section 552.022(a)(1) of the Government Code. With respect to the information subject to section 552.022, we make the following determination: the marked medical records may only be released as provided under the MPA. Information identifying living

clients of the facilities at issue is protected by privacy and must be withheld under section 552.101 of the Government Code. Texas driver's license numbers must be withheld under section 552.130 of the Government Code. Social security numbers of living individuals may be excepted under section 552.101 in conjunction with federal law. The bank account number information you have marked must be withheld under section 552.136 of the Government Code. Unless the department has received affirmative consent to their release, e-mail addresses of members of the public must be withheld under section 552.137 of the Government Code. The remainder of the information subject to section 552.022 of the Government Code must be released in compliance with copyright law. With respect to the remaining submitted information that is not subject to section 552.022, we have marked information that the department may withhold under section 552.107 of the Government Code as information protected by the attorney-client privilege. With the exception of information provided to or obtained by opposing parties in the anticipated litigation, which must be released, the department may withhold the remainder of the information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 190922

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